



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Kel-Log, Inc.
Attn: Michael P. Kelley
743 East River Road
Milan, NH 03588

Re: Lost Nations Road, Northumberland, NH
Tax Map R-10, Lots 215 & 1307

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 05-012**

January 20, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division to Kel-Log, Inc., pursuant to RSA 482-A and RSA 485-A:17 and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling \$8,000 be imposed against Kel-Log, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03302-0095.
2. Kel-Log, Inc. is a New Hampshire corporation having a mailing address of 743 East River Road, Milan, NH 03588.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose administrative fines of up to \$2,000 per offense for violations of RSA 485-A:17, rules adopted under RSA 485-A:17, and permits issued under RSA 485-A:17. Pursuant to RSA 485-A:22, the Commissioner had adopted Env-C 603.02 to establish a schedule of fines for such violations.

4. Scott A. Dillon and Thomas R. Dillon are the owners of land located off of Lost Nations Road, more particularly described on Town of Northumberland Tax Map R-10 as Lots 215 and 1307 ("the Property").
5. Michael P. Kelley is the president of Kel-Log, Inc., a New Hampshire corporation in the business of cutting and selling timber.
6. On June 23, 2003, a Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact ("Notification") was filed with DES regarding the Property.
7. On August 8, 2003, Forest Ranger John Accardi from the NH Department of Resources and Economic Development ("DRED") received a complaint from an abutter to the Property that a perennial stream flowing through the Property was running brown. Ranger Accardi inspected the area the same day and traced the source of the turbidity to where an excavator had crossed a perennial stream. A crossing device had not been installed; therefore, Ranger Accardi verbally advised the Forester for the Property, Edward Mellett, to install erosion controls and a crossing device.
8. On August 11, 2003, Ranger Accardi inspected the site a second time and found that erosion controls had not been installed. Ranger Accardi again spoke with Mr. Mellett and verbally advised him to install a proper crossing device and erosion controls.
9. On August 13, 2003, Captain Bert von Dohrmann, a Forest Ranger from the Department of Resources and Economic Development ("DRED") issued an Official Notice to Thomas Dillon. The specific violation alleged in the Official Notice is as follows: "Improper stream crossing being used. Cease and desist until proper crossing is installed."
10. On August 15, 2003, Division personnel conducted an inspection of the Property and observed and learned the following:
 - a. The wing wall and decking to a haul bridge had been built over the perennial stream;
 - b. The approach to the bridge and the stream embankments had been stabilized using mulch;
 - c. Hay bales and silt fence had been placed within the perennial stream;
 - d. The haul road extends up a steep grade for approximately 1,500 feet. Ditch lines to the haul road were exposed and unstable. Rills and gullies were evident along the ditch line and the embankments; and
 - e. The excavator constructing the haul road and crossing the perennial stream without a crossing device was owned by Kel-Log, Inc.
11. DES issued an on-site inspection report to Mr. Mellett requesting additional stabilization measures to the haul road. The on-site inspection report recommended, among other things, that

the ditch lines be stabilized using stone check dams and by seeding and mulching, and to install energy dissipaters at cross drainage culverts to prevent sediment from migrating into the stream.

12. On August 21, 2003, DES spoke with John Ballew, a forester employed by T.R. Dillon Logging, Inc. Mr. Ballew stated that he was upset with Mr. Mellett and Mr. Kelley for crossing the stream without a crossing device, and he recommended bridge specifications (the wing wall and added bridge height) to protect the perennial stream.

13. On May 20, 2004, a Notice of Intent to Cut Wood or Timber (the "Intent") was filed with the Town of Northumberland on the Property.

14. Paragraph 10. of the Intent states, "By signing below, the Logger/Forester or person responsible for cutting hereby accepts responsibility for verifying the volumes of wood and timber to be reported by the owner. I have become familiar with RSA 227-J, the timber harvest laws." Paragraph 10. of the Intent is signed by Michael P. Kelley as an individual.

15. On August 31, 2004, Captain von Dohrmann issued a fine in the amount of \$250 to Michael Kelley for "Failure to construct water bars according to BMPs established and enforced by DF&L."

16. On August 31, 2004, Captain von Dohrmann issued an Official Notice to Michael Kelley. The Official Notice states: "No (limited) water bars. Construct water bars according to BMP's to divert water from brook."

17. On November 29, 2004, Captain von Dohrmann contacted DES to report that additional violations had taken place on the Property.

18. On November 30, 2004, DES personnel conducted a field inspection. Prior to the inspection, DES personnel obtained digital photographs taken by Captain von Dohrmann. The digital photos were taken on November 24, 2004, and November 29, 2004. The photographs depict the perennial stream at the location of the August 2003 inspection running milky brown.

19. At the November 30, 2004 inspection, DES personnel observed the following:

- a. The east end of the landing was muddy and unstable. Water and sediment were migrating off of the southeast end of the landing and into intermittent drainages. The drainages were walked for a distance of at least 300' feet; the color of the water was cloudy and milky;
- b. The upslope perimeter of the landing (north side) had been ditched. Brown, muddy water was running in the ditch line, migrating down slope and into a perennial stream;
- c. Water and sediment had overloaded a silt fence installed upslope of the perennial stream;
- d. Water was observed running down the travel portion of skid trails leading into the log landing. No erosion controls were observed;

- e. The top of a cross-drainage culvert was exposed in the skid road. The inlet and outlet to the culverts were difficult to observe because they were covered with sediment and slash. No headwalls were observed;
- f. A second culvert had been installed in the skid trail. The outlet and inlet were not observed because they were covered with slash;
- g. A skidder bridge had been installed over a perennial stream. The underside of the skidder bridge had sunk so that it partially blocked the perennial stream; water was flowing westerly in the skid trail for a distance of approximately 25 feet before moving down slope, where it eventually rejoined the stream;
- h. Water was observed running down the travel portion of a second skid trail. An area had been dug in the skid trail in an attempt to create a water bar. A soil berm was observed at the end of the water bar. Water was being channeled into the water bar; however, the berm had failed, allowing water and mud to sheet and flow into intermittent drainages that eventually ran into the perennial stream;
- i. Deposition measuring 2 inches to 6 inches deep was observed in the perennial stream. The length of the deposition within the stream channel, from the skidder bridge downstream, measured at least 500 linear feet; and
- j. Water samples were collected in the perennial stream, a tributary to Burnside Brook, resulting in a turbidity level of 45.4 nephelometric turbidity units.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Kel-Log, Inc., has violated RSA 482-A:3 by failing to comply with timber harvesting best management practices, specifically by:
 - a. Failing to stabilize the log landing, resulting in sediment to enter a perennial and intermittent stream;
 - b. Failing to properly install and maintain cross-drainage culverts within skid trails;
 - c. Failing to properly install and maintain water bars, resulting in sediment to enter a perennial stream; and
 - d. Failing to properly construct and maintain a stream crossing device, partially diverting water from a perennial stream.

For these violations, Env-C 614.06 specifies a fine of \$2,000.

2. Kel-Log, Inc. has violated RSA 485-A:17 by failing to comply with best management practices, resulting in excessive turbidity to an intermittent stream. For this violation, Env-C 603.02 (e)(2) specifies a fine of \$1,000.

3. Kel-Log, Inc. has violated RSA 485-A:17 by failing to comply with best management practices, resulting in excessive turbidity to a perennial stream. For this violation, Env-C 603.02(e)(2) specifies a fine of \$1,000.
4. Kel-Log, Inc. has violated RSA 482-A:3, I by disturbing more than 200 linear feet of stream channel by allowing sediment to be deposited into the stream. For this violation, Env-C 614.059(c) specifies a fine of \$2,000.
5. Kel-Log, Inc. has failed to adequately install and maintain erosion controls to protect a perennial stream in August 2003 and November 2004. For this repeat violation, Env-C 614.06(b) specifies a fine of \$2,000.

The total fine being sought is \$8,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, Kel-Log, Inc. is required to respond to this notice. Please respond no later than February 21, 2005, using the enclosed colored form.

1. If Kel-Log, Inc. would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If Kel-Log, Inc. chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Kel-Log, Inc. wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Kel-Log, Inc.'s interest in settling.

Kel-Log, Inc. is not required to be represented by an attorney. If Kel-Log, Inc. chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the Kel-Log, Inc. committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the Kel-Log, Inc. committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine

sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Kel-Log, Inc. proves, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** the Kel-Log, Inc. did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** the Kel-Log, Inc. did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Kel-Log, Inc. was making a good faith effort to comply with the requirement that was violated.
3. Kel-Log, Inc. has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to the Kel-Log, Inc.'s case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Kel-Log, Inc. committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Kel-Log, Inc.'s opportunity to present testimony and evidence that Kel-Log, Inc. did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Kel-Log, Inc. has any evidence, such as photographs, business records or other documents, that Kel-Log, Inc. believes show that Kel-Log, Inc. did not commit the violation(s) or that otherwise support Kel-Log, Inc.'s position, the Kel-Log, Inc. should bring the evidence to the hearing. Kel-Log, Inc. may also bring witnesses (other people) to the hearing to testify on Kel-Log, Inc.'s behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If the Kel-Log, Inc. has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY

Harry T. Stewart, P.E.

Director

Water Division

Enclosure (*NHDES Fact Sheet #CO-2002*)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Public Information Officer, DES PIP Office
Marjorie Swope, NHACC
Linda Magoon, DES Wetlands Bureau
Bert von Dohrmann, DRED
John Accardi, DRED

***** RETURN THIS PAGE ONLY *****

**KEL-LOG, INC. IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN February 21, 2005

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Kel-Log, Inc.

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Kel-Log, Inc.

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$8,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:
Department of Environmental Services ~ Legal Unit
Attn: Michael Sclafani, Legal Assistant
P.O. Box 95
Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.